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No. 95-594

In The

Supreme Court of the United States

October Term, 1995

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioner,

vs.

FRANCES HOUSTON and KENNETH WOODBURY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Frances Houston and Kenneth Woodbury, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, St. Paul Fire and Marine Insurance Company.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Pet. App. 1a-12a) is reported at 55 F.3d 1420. The opinion of the United States District Court (Pet. App. 13a-15a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on May 26, 1995. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 13, 1995. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

Contrary to petitioner's argument, respondents do not believe any statute is involved in this case.

STATEMENT OF THE CASE

A. Factual Background

Big Brothers/Big Sisters of Juneau, Inc. (BB/BS)[1] purchased insurance from St. Paul Fire and Marine Insurance Company. The insurance included two different policies, a general liability policy, and a professional liability policy. Pet. App. 4a.

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1. The court of appeals incorrectly describes this entity as "Big Brothers and Big Sisters of Alaska". Pet. App. 2a. It is correctly identified elsewhere in the record. *See*, for example, Pet. App. 28a and 29a.

In the process of marketing these policies, St. Paul's agent, Jack Kirby, had written to the BB/BS national board of directors in 1981. In that letter, Mr. Kirby stated that there was a growing number of lawsuits alleging child molestation being brought against the BB/BS agencies and their officers and directors. Kirby went on to state that:

> Professional liability insurance with general liability insurance is the only certain method of insuring against child molestation claims. Regardless of how the suit is filed and what allegations are made, the combination of those two policies will ensure proper coverage.

Pet. App. 5a.

BB/BS purchased both the general liability and professional liability policies. Pet. App. 4a. Ken McQuade was an employee of BB/BS. BB/BS officers and employees, acting within the scope of their duties, were named insureds under the professional liability policy. Pet. App. 4a, 5a. An exclusion provided that there was no coverage for volunteer Big Brothers for their illegal acts, but that exclusion was expressly inapplicable to other named insureds, such as Ken McQuade. Pet. App. 4a.

Between the summer of 1983 and McQuade's arrest in March of 1986, BB/BS executive director Kenneth McQuade sexually molested respondent Kenneth Woodbury. Pet. App. 18a, 19a. McQuade was eventually convicted of sexual abuse of a minor and sentenced to prison. Pet. App. 20a.

B. Procedural Background

Woodbury and his mother, Frances Houston, respondents in

this proceeding, filed suit in Alaska's superior court against BB/BS and McQuade. Petitioner, St. Paul Fire and Marine Insurance Company, defended BB/BS. Houston and Woodbury settled with BB/BS, indemnified by St. Paul, after the Alaska superior court in Juneau granted BB/BS's partial summary judgment motion on the issue of *respondeat superior*. Pet. App. 2a.

St. Paul refused to defend or indemnify McQuade and filed an action for declaratory judgment in the United States District Court in Anchorage. Pet. App. 2a, 3a. On July 14, 1993, the district court issued an order based on the decision in *Allstate v. Roelfs*, 698 F. Supp. 815 (D. Alaska 1987). Pet. App. 13a-15a. The *Roelfs* decision was about a *homeowner's policy*. The district court ruled that the *professional liability policy* issued by St. Paul did not cover McQuade for his sexual abuse of Woodbury. Pet. App. 15a.

Respondents appealed the order of the district court to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed and remanded. Pet App. 1a-12a. St. Paul's instant petition for certiorari follows the Ninth Circuit's denial of petitioner's petition for rehearing.

SUMMARY OF THE ARGUMENT

This case presents nothing extraordinary to this Court. There are no special reasons why the Court should grant certiorari in this case. There is no conflict among the circuits on the issues decided in this case. Nor is there a conflict between the Ninth Circuit's decision below and the decisions of the Alaska supreme court.

This case turns on narrow insurance policy language in this unique insurance policy, and marketing representations made by petitioner's agent. The Ninth Circuit correctly applied Alaska

law in deciding that McQuade was covered for his acts of sexual abuse under this unique policy. Furthermore, the Ninth Circuit correctly applied the Alaska law of collateral estoppel in concluding that respondents were not collaterally estopped from litigating the issue of whether the policy covered McQuade.

In any case, review by this Court would have no precedential value whatsoever.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT CORRECTLY APPLIED STATE LAW IN CONCLUDING THAT THE POLICY PROVIDED COVERAGE FOR MCQUADE.

Contrary to petitioner's argument, the Ninth Circuit correctly applied Alaska law in its holding that McQuade was covered under the insurance policy in question.

This case turns on narrow policy language in this unique policy and particular statements made by petitioner's agent in an aggressive marketing campaign to sell insurance to BB/BS agencies across the country. It is clear from both those marketing statements and the policy language that the insurance coverage for acts of sexual molestation was contemplated by both petitioner and BB/BS agencies that purchased the coverage.[2]

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2. Representations by Jack L. Kirby Insurance describe this coverage as unique and specifically intended to provide executive directors with coverage for child molestation claims:

> The *Professional* Liability (the real basis for the program) was designed for BB/BS agencies. The

(Cont'd)

The Ninth Circuit looked to Alaska law to interpret the policy. It correctly looked at both the policy's language and the representations of St. Paul's agent. *INA Life Ins. Co. v. Brundin*, 533 P.2d 236, 242 (Alaska 1975). It concluded from the terms of the policy and Kirby's marketing representations that an employee in McQuade's position "had every right to expect that he was not excluded from coverage for criminal acts," citing *Serradell v. Hartford Accident & Indemnity Co.*, 843 P.2d 639, 641 (Alaska 1992).[3] Furthermore, the Ninth Circuit correctly noted that it was McQuade's actions within the scope of his duties that led to the ultimate acts of sexual abuse of respondent Woodbury. Pet. App. 9a, 10a.

(Cont'd)

> policy language is totally unique. Nothing like it is being offered elsewhere. (R-40, Exh. 5, p. 2). (Emphasis in the original).
>
> * * *
>
> ... the Professional Liability Insurance *properly written* is the only coverage that assures *you* of adequate protection for child molestation. This professional coverage, which was designed for Big Brothers/Big Sisters Agencies, is unique on the American Insurance Market. There is nothing else available anywhere designed especially for your operations. (R-40, Exh. 6, p.1) (First emphasis in the original; second emphasis added.)

It should be noted that the last quotation above is contained in a letter addressed to "Dear Executive Director." Executive Directors, the people deciding whether or not to buy the coverage, are being told that they ("you") are covered for child molestation claims "[r]egardless of how the suit is filed and what allegations are made . . ." Pet. App. 5a. Neither correspondence nor policy language constrains, limits, or excludes these broad promises made to BB/BS executive directors like Ken McQuade.

3. *See supra*, note 2.

Likewise, the Ninth Circuit looked to an Alaska supreme court opinion in discussing the public policy issue that petitioner raised. The court acknowledged that the Alaska supreme court had not yet addressed the issue of innocent third parties in a case with facts exactly on point with this case. However, the court did cite *Atlas Assurance Co. of America v. Mistic*, 822 P.2d 897, 899-900 (Alaska 1991). Pet. App. 8a. The *Mistic* court held that when an insured intentionally burned his house, an innocent co-insured was allowed to collect her half of the proceeds. The court also noted that other courts have allowed similar insurance coverage to compensate an innocent victim for an injury intentionally caused by an insured [including the Fourth Circuit in *St. Paul Fire and Marine Ins. Co. v. Jacobson*, 48 F.3d 778 (4th Cir. 1995)]. Pet. App. 7a, 8a.

The Ninth Circuit also accurately distinguished the case relied on by the district court in its ruling, *Allstate v. Roelfs*, 698 F. Supp. 820 (D. Alaska 1987).[4] The *Roelfs* case simply supported the proposition that, under Alaska law, when an insurance policy contains an explicit exclusion for bodily injury intentionally caused by the insured, intent to cause injury can be inferred as a matter of law from an act of sexual assault. The Ninth Circuit correctly concluded that *Roelfs* did not apply in the instant case since petitioner's policy did *not* contain an exclusion for bodily injury intentionally caused by an insured, but instead made the exclusion for coverage of criminal acts of volunteer Big Brothers expressly inapplicable to employees like McQuade. Pet. App. 6a, 7a.

This Court should not grant *certiorari* to discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925). Any

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4. It is interesting to note petitioner relied on *Roelfs*, a federal district court case, in its briefing to the Ninth Circuit, though it now argues that the Ninth Circuit should have based its ruling on Alaska law.

review by this Court on the specific facts involved would be inapplicable in other cases and would have little or no precedential effect.

II.

THE NINTH CIRCUIT DID NOT VIOLATE THE FULL FAITH AND CREDIT ACT.

A. The Ninth Circuit Correctly Applied the Relevant Alaska Law in Determining That There Was No Collateral Estoppel.

The Ninth Circuit did not violate the Full Faith and Credit Act. Instead, it correctly applied the law of Alaska to hold that respondents were not collaterally estopped from litigating the issue of whether McQuade was insured for his acts of sexual abuse under the insurance policy in question. Pet. App. 10a, 11a. The same decision would have been rendered in an Alaska state court.

Petitioner argues that the trial court's order on partial summary judgment should be given preclusive effect. However, the Ninth Circuit, citing *Briggs v. State Department of Public Safety*, 732 P.2d 1078, 1082 (Alaska 1987), which quotes *Restatement (Second) of Judgments*, § 13 (1982), correctly pointed out that the partial summary judgment was not a final judgment "sufficiently firm to be granted conclusive effect." Pet. App. 11a. Nor did the Ninth Circuit "view the partial summary judgment on the same plane with the exhaustive decision, after full trial, given collateral estoppel effect in *Borg Warner v. AVCO Corp.*, 850 P.2d 628 (Alaska 1983)." Pet. App. 11a.

Furthermore, *Borg Warner* also requires that the issue to be precluded be identical to the issue decided in the first action. *Borg Warner* at 634.

Here the issue St. Paul seeks to preclude, *respondeat superior*, is *not* identical to the narrow issue of insurance coverage considered in the district court's declaratory judgment action. That is, the state superior court's partial summary judgment ruling on Big Brothers/Big Sisters' vicarious liability for McQuade's acts of sexual abuse is quite different from the issue in the declaratory judgment action of whether or not *McQuade's acts* are covered *under the terms of the insurance policy*. Pet. App. 9a, 10a.

Finally, *even if* the Ninth Circuit had somehow violated the Full Faith and Credit Act by its holding, there is no reason why this Court should grant certiorari in this case to address such a violation.

III.

THIS CASE PROVIDES NO OPPORTUNITY TO THE COURT TO CLARIFY THE ROLE OF FEDERAL COURTS OF APPEAL IN EXERCISING THEIR RESPONSIBILITY TO REVIEW STATE LAW ISSUES INDEPENDENTLY.

A. There is No Need for This Court to Articulate Further the Process By Which Federal Courts Are to Determine State Law.

The present body of the United States Supreme Court case law is clear on how the federal courts are to determine issues of state law. However, the petitioner argues that:

> The [supreme] court should make clear that the duty of the federal courts, whether at the trial or appellate level, is to predict what the forum state court would decide and not to

> substitute their own point of view under the guise of *de novo* review.

Pet. at 9-10.

Respondents respectfully submit that there is no reason for this Court to articulate any more specifically how federal courts need to determine state law in diversity cases. The law that petitioner itself cites [*Meredith v. Winter Haven*, 320 U.S. 228 (1943) and *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956)] sufficiently elucidates how the federal courts are to go about determining state law.

In the instant case, the Ninth Circuit correctly applied the state law of Alaska regarding insurance policy interpretation in determining that McQuade was covered under petitioner's insurance policy. There was no reason for the Ninth Circuit to look at the decisions of the state trial courts in this case. Instead, the Ninth Circuit based its decision on its analysis of the narrow policy language involved in this case and the *Mistic* decision to reach its conclusion, acknowledging that the Alaska supreme court had not yet had the opportunity to rule on the precise coverage issue that this case presented. Pet. App. 8a, 9a. There is no reason for this Court now to second guess the Ninth Circuit's interpretation of Alaska state law. *Hering v. Prosie*, 462 U.S. 306, 314, n.8 (1983).

Neither does this case provide any significant opportunity for this Court to decide when federal courts should follow determinations of state trial courts. Petitioner asks this Court to grant certiorari because this case presents an opportunity to "clarify precisely when federal courts should follow determinations of law by state trial courts." Respondents submit that this case presents no significant nor unique opportunity to do so.

Furthermore, respondents do not believe there is any basis for drawing conclusions from the Alaska supreme court's refusal to certify issues from the federal district court below. The Alaska supreme court gave no reason whatsoever in its order by which it denied certification of the issues from the district court. Pet. App. 26a. Indeed, it is interesting to note that the petitioner vigorously opposed the district court's attempt to certify those very issues.

Even if this Court felt that it needed to more specifically articulate how federal courts should determine issues of state law, there is no reason for this Court to grant certiorari in this particular case. This case provides no special opportunity to make such an articulation. Indeed, this case turns on a very narrow set of facts involving an admittedly unique policy of insurance[5] which distinguish it from all other Alaska decisions in the area.

IV.

PETITIONER'S "FLOOD GATES" ARGUMENT IS WITHOUT MERIT.

Contrary to petitioner's assertions, the Ninth Circuit's ruling will not "always" provide coverage for acts of intentional harm (*e.g.*, an arsonist still will be unable to collect insurance proceeds when he burns down his house).

The ruling in this case, as the Ninth Circuit panel pointed out, is based on St. Paul's own specific policy language and marketing assertions. The holding will not have the effect of inducing other intentional actors, like child molesters, to perpetrate such acts with relaxed confidence that they are insured if they are sued civilly for their actions. On the contrary, as the Ninth Circuit

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5. *See supra*, note 2.

noted, perpetrators like McQuade face social stigma and severe criminal penalties for sexual abuse. Pet. App. 7a-9a. It is extremely unlikely that the Ninth Circuit's decision will have any precedential value except in those rare cases when companies like St. Paul elect to sell insurance to cover criminal acts as part of an overall marketing strategy.[6]

CONCLUSION

Accordingly, for all the foregoing reasons, petitioner's request for a writ of certiorari should be denied. The petitioner has failed to satisfy criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. Petitioner has not cited one other circuit court opinion on point that differs from the holding in this case. Furthermore, this case has no potential precedential value because of its unique facts.

Respectfully submitted,

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6. *See supra*, note 2.